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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 237

BENJAMIN RICHMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and partially dissenting opinions in the Court of Appeals (R. 142-154) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 22, 1949 (R. 155). On July 18, 1949, petitioner's time to file his petition for a writ of certiorari was extended to August 8, 1949, by order of Mr. Justice Burton (See Pet. 2) and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the goods which petitioner was convicted of stealing and possessing were goods in interstate commerce within the purview of the Act of February 13, 1913, as amended.

STATUTE INVOLVED

The Act of February 13, 1913, c. 50, 37 Stat. 670, as amended, 43 Stat. 793, 47 Stat. 773 (18 U.S.C. (1940 ed.) 409), provided in pertinent part at the time of the offenses in question here:

> Whoever * * * shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, wagon, automobile, truck, or other vehicles, * * * with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express, or shall buy or receive or have in his possession any such goods or chattels, knowing the same to have been stolen * * * shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both * * *. * * * The words, "station house," "platform," "depot," "wagon," "automobile," "truck," or "other vehicle," as used in this section, shall include any station house, platform, depot, wagon, automobile, truck, or other vehicle of any person, firm, association, or corporation having in his or its custody therein or thereon any freight, express, goods, chattels, shipments, or baggage moving as or which are a part of or which constitute an interstate or foreign shipment.

STATEMENT

On December 11, 1946, petitioner and a co-defendant, Nathan Gollin, were indicted on two counts, the first for stealing and the second for receiving and possessing 600 cases of bottled beer, "which said goods and chattels were moving as, formed a part of and constituted an interstate shipment of freight in the course of shipment in interstate commerce" (R. 6-8). The defendants were tried and convicted on both counts. On appeal, the convictions were reversed on the ground that the trial court erred in instructing the jury that as a matter of law the beer was in interstate commerce at the time of the theft; the Court of Appeals held that it was within the province of the jury to believe or disbelieve the uncontradicted testimony as to the loading and movement of the truck from which the beer was stolen. *United States* v. *Gollin,* 166 F. 2d 123 (C.A. 3) . The defendants nevertheless petitioned for certiorari to review the holding of the District Court, affirmed by the Court of Appeals, that the evidence, if believed, established that the beer was in interstate commerce when it was stolen. This Court denied the petition for certiorari. 333 U. S. 875, No. 669, O.T. 1947.

The case was thereafter retried and the defendants were again found guilty on both counts (R. 123). Both were sentenced to two years' imprisonment on each count, the sentences to run concurrently (R. 133, 135). The defendants did not testify in their own behalf.

The uncontradicted evidence showed that during the late evening of June 14 or the early morning of June 15, 1946,[1] a truck of P. Ballantine and Sons was loaded with 600 cases of beer at one of the loading platforms of the company's plant in Newark, New Jersey. The truck was sealed and a bill of lading was made out for shipment to Charles Luberger, Tarrytown, New York. (R. 12-14.) The truck was thereafter checked out and driven two blocks from the loading platform and parked (R. 14-15). The bill of lading and the keys for the truck were deposited on a rack in the Ballantine garage (R. 15). During the early afternoon of June 14, 1946, there had been posted on a bulletin board near the time clock used by the drivers a schedule assigning drivers to the work of the morning of the 15th. On this schedule two drivers were assigned to the truck on which the beer in question was loaded. (R. 70-74.) Customarily, the drivers went to the garage in the morning, picked up the key and the bill of lading from the key rack pursuant to their assignment, checked out and proceeded with their prescribed task of driving the truck to its destination (R. 31-33). The truck in question was stolen some time before the arrival of the drivers assigned to it (R. 15-16).

At the close of the evidence, the defendants having moved for a directed verdict of acquittal and

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[1] The witness Borowsky gave the dates as June 15 and June 16 but it is clear from the record that this was an error and that the 14th and 15th were intended (e.g. R. 40, 42, 66, 69).

the motion having been denied (R. 92-103), the court charged the jury in relevant part as follows (R. 108):

> * * * the burden is upon the Government to prove, if it is to sustain the charge in the indictment, that at the time of the theft the interstate transportation of the merchandise in question had actually commenced.

In response to a question from the jury after they had retired to deliberate, the court stated further in relevant part:

> Now, interstate commerce commences, within the meaning of that definition, when the transfer of the commodity to another state is actually commenced. More simply stated, the merchandise in question is put in commerce with the intent that it shall be delivered to its ultimate destination. The statute requires that the goods shall be, as this suggests, on their way. It doesn't mean that has to be five miles, ten miles, fifteen miles, twenty miles, but it does require that the transportation of the commodity, whatever it is—and here it happens to be a shipment of beer—shall have been commenced. Now, it is difficult to illustrate without encroaching in some way upon what might be your prerogative and I don't care to do it, but you will bear in mind the simple definition which I have taken by the case decided by the Appellate Court, that commerce begins when the transfer of the commodity to another state is actually commenced. [R. 119; see also R. 122.]

The Court of Appeals affirmed the convictions, rejecting the defendants' contention that the stolen goods were not at the time of the theft in interstate commerce within the meaning of the Act. The majority held that under the statute the stealing of property which had been "constituted" as an interstate shipment is as much an offense as stealing goods actually in transit in interstate commerce, that the indictment alleged both that the stolen goods constituted an interstate shipment and were moving in interstate commerce, and that on either theory the evidence was sufficient to sustain the jury's verdict. The majority added that in view of their construction of the statute and the indictment, the trial court's instructions to the jury that the burden was upon the Government to prove that at the time of the theft the transportation of the goods had actually commenced were more favorable to the defendants than they were entitled to under the statute. (R. 148-151, 153.) One judge dissented from the majority's construction of the indictment. He thought that it charged only theft of goods the interstate movement of which had already begun. He did not, however, dissent from the affirmance of the convictions. (R. 153-154.)

ARGUMENT

The multiform statement of petitioner's contention is essentially the same as that presented in the earlier petition for a writ of certiorari which this Court denied. 333 U. S. 875. That position is in substance that the goods had not yet begun to move

in interstate commerce when they were stolen and that consequently the theft did not constitute a crime within the contemplation of the statute under which petitioner was convicted. Much of petitioner's argument challenges the alternative holding of the majority below that the convictions were valid under their construction of the statute as denouncing theft of goods which have been constituted as an interstate shipment as well as goods which have actually entered interstate commerce, and is offered in support of the proposition that proof that the stolen goods had begun to move in interstate commerce was an essential element of the crime (Pet. 8-11). In the context of this case, however, argument of that question is purely academic. The case was submitted to the jury upon the theory that to sustain the charges of the indictment it was necessary to find that at the time of the theft the transportation of the merchandise had actually commenced. The jury's verdict of guilty evidences that it did so find and that finding, we submit, is consistent both with the undisputed evidence and the law.

The evidence shows that a truck was loaded with beer in Newark, New Jersey, destined for a consignee in Tarrytown, New York. The truck was sealed, a bill of lading was made out, drivers were assigned to the truck and the truck was removed from the loading platform to a spot two blocks away, whence the drivers were to take it on its journey several hours later. Before the arrival of the drivers the truck was stolen.

At the time of the theft the interstate shipment of the goods had already begun. It is, of course, true that in some contexts the fact that the owner of the goods was also the carrier has frequently presented some difficulty in ascertaining the precise moment when goods entered the flow of interstate commerce. *Hughes Bros. Co.* v. *Minnesota,* 272 U. S. 469, 475-476; *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366, 376. But clearly the identity of the owner and carrier does not affect the interstate character of the shipment. *Marifian* v. *United States,* 82 F. 2d 628 (C.A. 8), certiorari denied, 298 U. S. 686; *Friedman* v. *United States,* 233 Fed. 429 (C.A. 1), certiorari denied, 244 U. S. 657.

As we pointed out in our brief in opposition to the earlier petition for certiorari, what happened in effect was that the owner of the goods transferred them from itself as shipper to itself as interstate carrier under a through bill of lading. When the truck had been sealed and removed from the loading platform, the bill of lading made out, the drivers assigned and nothing left but for the drivers to arrive and take the truck, that transfer was completed. It would have been clear that the interstate shipment had commenced if the truck had belonged to an independent interstate carrier, *United States* v. *DeNormand,* 149 F. 2d 622, 624 (C.A. 2), certiorari denied, 326 U. S. 756, or even to an intrastate transfer company. *United States* v. *Fox,* 126 F. 2d 237 (C.A. 2); *Sharp, et al* v. *United States,* 280 Fed. 86, 88 (C.A. 5). The mere fact that the owner of the goods was also the carrier does not re-

quire the application of a different test for determining the time of commencement of the interstate shipment.

It is petitioner's contention that the interstate shipment did not and could not commence until the drivers arrived and signed out (Pet. 16-17). In making this argument petitioner has seized upon a trifling detail upon which to rest the wholly insupportable argument that some circumstance such as the need for repair of the truck or a change in plan might have intervened to defer or cancel the shipment. The possibility of delay in shipment for needed repairs or deferment or cancellation of the trip for other reasons is not peculiar to the owner-carrier alone. It is likewise present when the goods are in the hands of an independent carrier. Yet under the decided cases if the truck had been owned by an independent carrier the interstate shipment would unquestionably have begun upon delivery of the goods to it, notwithstanding either delay in awaiting the arrival of drivers, *Champlain Realty Co.* v. *Brattleboro, supra,* at 376; *United States,* v. *Sheffield Farms Co.,* 43 F. Supp. 1, 5 (S.D. N.Y.), or the possibility of a change in plan resulting in cancellation of the shipment. *Hughes Bros. Co.* v. *Minnesota, supra,* at 475-476.[2]

Beyond the foregoing, petitioner asserts (Pet. 11-15) that the decision below is in conflict with

[2] As to the possible need for repairs relied upon by petitioner, there is no reason to suppose that an interruption caused thereby would have necessitated the conclusion that the interstate shipment had not yet begun. *Champlain Realty Co.* v. *Brattleboro, supra,* at 376. In any event, the checker's sheet

other decisions upon which he relies and which either support the decision below or are readily distinguishable. Thus, *Coe* v. *Errol*, 116 U. S. 517 (see Pet. 12-13), involved a question of interstate commerce only in so far as it affected the right of a state to levy a tax. Apart from the fact that a "ruling as to the extent of a state's taxing power is not conclusive as to the boundaries of interstate commerce for federal purposes" (*United States* v. *Yellow Cab Co.*, 332 U. S. 218, 232; see also *United States* v. *Fox, supra*), the Court merely held that lumber which was held within the state for as long as a year prior to shipment to another state had not yet entered the flow of interstate commerce so as to deprive the state of its taxing power. The opinion, moreover, made it clear (p. 525) that if, as in the case at bar, the goods had actually been started in the course of transportation to another state or delivered to a carrier for such transportation there would have been no question as to their being in interstate commerce.

Hughes Bros. Co. v. *Minnesota, supra* (see Pet. 12), on the other hand, also involved the right of a state to tax goods claimed to be in interstate commerce. A lumber company had cut logs in Minnesota and hauled them to the ice covered Swamp River in the same state. When the ice broke, these

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had been made out prior to the theft (R. 60) and the space for indicating needed truck repairs was left blank (Exhibit G-7, R. 131), so that, whatever the possibilities generally may have been, the truck in this case was scheduled to leave without interruption for repairs.

logs, pursuant to an already existing contract of sale, were to be floated to the border of the state where they were to be picked up by a ship for transportation to a paper company in another state. The hauling of the logs to the Swamp River was completed the latter part of March 1922. The ice broke on April 29, 1922, and by the end of July all the logs had been shipped. The Court in that case, as here, held that the movement to another state had already begun. It said, at pp. 475-476: "The character of the shipment in such a case depends upon all the evidential circumstances looking to what the owner has done in the preparation for the journey and in carrying it out." We submit that in the present case, in accord with this holding, the preparation for the journey had been completed and the initial movement in carrying it out had been made.

United States v. *Yellow Cab Co.*, 332 U. S. 218, 228, 230 (see Pet. 13-14), merely decided that the operation of a local taxi cab service, as distinguished from an exclusive service for the carriage of passengers from one railroad station to another in the same city, which the Court held did constitute a part of interstate commerce, was too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act. The Court, moreover, pointed out, at p. 231, that "what may fairly be said to be the limits of an interstate shipment of goods and chattels may not necessarily be the commonly accepted

limits of an individual's interstate journey. We must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical considerations".[3]

United States v. *Fox, supra, Wolk* v. *United States,* 94 F. 2d 310, 312 (C.A. 8), and *Sharp, et al.* v. *United States,* 280 Fed. 86, 88 (C.A. 5) (see Pet. 15), are not in conflict with the holding below. We assume that petitioner is again urging, as he did in his earlier petition, that the court's statement in each of those cases to the effect that the goods in question entered the flow of interstate commerce at least upon the happening of a certain event is synonymous with or requires the conclusion that interstate movement begins "only" upon the happening of a similar contingency. This, we submit, is a patent *non sequitur.*

Petitioner cites the cases of *Baltimore and O. S. W. R. R. Co.* v. *Settle,* 260 U. S. 166, *Western Oil Refinining Co.* v. *Lipscomb,* 244 U. S. 346, and *Texas and New Orleans Railway Co.* v. *Sabine Tram Co.,* 227 U. S. 111, for the proposition, which we do not challenge, that "whether or not interstate commerce has commenced is to be determined by what was actually done and not by the mere billing" (Pet. 17). It is our contention, in fact, that in the instant case the billing, together with all of the other things that were done in connection with the goods, clearly established the commencement of the

[3] *Hammer* v. *Dagenhart,* 247 U. S. 251 (see Pet. 13), involved no question as to when interstate commerce begins. It has, in any event, been overruled. *United States* v. *Darby,* 312 U. S. 100, 115-117.

shipment in interstate commerce. It is noteworthy that in the *Texas and New Orleans Railway case, supra,* the Court, at p. 124, expressly rejected the contention that "freight is never shipped, in the sense of the law, * * * until it is launched upon its final continuous trip to a foreign country."

Nor is any conflict discernible in the case of *United States* v. *Sherman,* 171 F. 2d 619 (C.A. 2), certiorari denied *sub nom. Grimaldi and Whelan* v. *United States,* 337 U. S. 931-932 (see Pet. 17), in which goods stolen from a truck which was delivering them to a dock in New York for shipment to East Africa were held to have been in foreign commerce. There, too, the argument was made that since the goods had not yet come into the possession of the steamship company which was to carry them abroad they had not yet entered foreign commerce, an argument which the court rejected.

CONCLUSION

This case does not involve any conflict of decisions or any question meriting further review. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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